

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Unauthorized Diversion by the

NORTH GUALALA WATER COMPANY

Enforcement Action 70

SOURCE: North Fork Gualala River tributary to Gualala River thence Pacific Ocean

COUNTY: Mendocino County

YOU ARE HEREBY GIVEN NOTICE THAT:

1. North Gualala Water Company (NGWC) is alleged to have violated Water Code section 1052, subdivision (a), which states:

“The diversion or use of water subject to [division 2 of the Water Code (commencing with section 1000)] other than as authorized in [division 2] is a trespass.”
2. Water Code section 1052, subdivision (b), provides that the State Water Resources Control Board (State Water Board) may administratively impose civil liability in an amount not to exceed \$500 for each day that a trespass occurs.
3. Water Code section 1055, subdivision (a), provides that the Executive Director of the State Water Board may issue a complaint to any person or entity on whom administrative civil liability (ACL) may be imposed. On May 17, 1999, the Executive Director delegated to the Deputy Director for Water Rights¹ the authority to issue a complaint to impose an ACL under Water Code section 1055, subdivision (a). This authority may be and has been redelegated to the Assistant Deputy Director for Water Rights.

ALLEGATIONS

4. The following facts provide the basis for the alleged trespass:
 - a) On August 26, 1964, NGWC filed Application 21883 (A21883) with the Division of Water Rights (Division). NGWC sought to directly divert water at a rate of 2 cubic foot per second (cfs) year-round from the North Fork Gualala River. The water would be used for municipal purposes.
 - b) The California Department of Fish and Game (DFG) filed a protest against A21883 on the basis of injury to the instream resources of steelhead and silver salmon. The protest was resolved when both parties agreed to the inclusion of a permit term (Term 9) requiring NGWC to bypass the following minimum stream flows:

5 cfs, or the natural flow if it is less, during the period of November 1 to June 1

1 cfs, or the natural flow if it is less, during the period of June 1 to November 1

¹ Formerly Chief of the Division of Water Rights (Division Chief).

On September 3, 1965 Permit 14853 (P14853) was issued to NGWC with the above minimum bypass requirements.

- c) In 1974, NGWC petitioned the State Water Board for a change in the place of use authorized under P14853. DFG protested the change petition, and as a dismissal condition, requested that the minimum bypass flows of Term 9 be increased. The State Water Board did not receive an objection by NGWC to DFG's proposal. On December 13, 1978, the State Water Board issued an order approving NGWC's petition. The order also added a requirement for a stream flow measuring device (Term 10) and modified Term 9 by increasing the minimum bypass flow requirements to the following:
 - 40 cfs, or the natural flow if it is less, during the period of November 15 to February 29
 - 20 cfs, or the natural flow if it is less, during the period of March 1 to May 31
 - 4 cfs, or the natural flow if it is less, during the period of June 1 to November 14
- d) In 1988, Division staff conducted a complaint investigation into allegations by two separate parties that NGWC violated its permit by diverting when minimum bypass flows could not be met. A report of the investigation, dated January 17, 1989, contained staff's finding that there was insufficient evidence to conclude that a violation of the permit occurred, however staff found NGWC's stream flow measuring device to be deficient. A follow-up inspection by Division staff on May 8, 1989 found that the deficiency had been corrected.
- e) Due to concerns regarding drinking water quality from the permitted diversion point, NGWC drilled wells in the alluvial aquifer of the Gualala River. Well 4 proved to be sufficiently productive to prompt NGWC to suspend its diversion of surface water from North Fork Gualala River. In submitting its progress reports for the years 1990 through 1992, NGWC stated that no water had been used under P14853. NGWC believed that its diversion from Well 4 was from percolating groundwater and outside the State Water Board's permitting authority. On December 21, 1992 Division staff notified NGWC that, consistent with the findings of a November 5, 1992 Hydrogeologic Assessment Report, prepared by Richard C. Slade, R.G., the Division considered the source of Well 4 to be a subterranean stream, and therefore subject to the permitting authority of the State Water Board. Reserving the right to provide evidence contradicting the Division's position, NGWC filed a petition with the State Water Board in February 1993 to add Well 4 and future Well 5 as points of diversion under P14853². The petition was noticed to the public and numerous parties submitted protests based on environmental and public trust considerations.
- f) In 1993, Division staff conducted a compliance inspection regarding the diversion facilities under P14853. In a report dated November 18, 1993, staff found that the permitted point of diversion had been abandoned in favor of an alternative unauthorized well. NGWC had already filed a change petition for this new point of diversion. NGWC also did not have a stream flow measuring device as required by Term 10 of the permit. Staff agreed that the physical conditions of the river make a permanent and readable piece of equipment nearly impossible to maintain, although other methods of determining stream flow measurements are available. Staff also concluded there was a relatively small potential for adverse impacts to fisheries due to diversions at that time.
- g) In response to another complaint filed against NGWC for unauthorized diversions (also at Well 4) under P14853, Division staff conducted a complaint investigation in 1994. In a report dated September 28, 1994, staff concluded that NGWC was diligently pursuing its change petition, and that the concerns of the complainant would be addressed through the petition process. On November 2, 1994, NGWC requested amending the change petition to delete all points of diversion except existing Well 4 and future Well 5. Although NGWC and the protestants formed

² The change petition also included a request to add 13 parcels to the place of use. Because it has no bearing on this enforcement action, all references to action involving the change in place of use have been omitted for brevity.

a conflict resolution group which, for several years, attempted to resolve the protests against the change petition, a resolution was never reached.

- h) By Memo dated January 15, 1998, Luhdorff and Scalmanini, Consulting Engineer for NGWC, released a final report entitled *Investigation of Ground-Water Occurrence and Pumping Impacts at Elk Prairie*. The report summarized the investigation to determine the classification of groundwater pumped from Well 4. The report concluded that the groundwater pumped from Well 4 was percolating groundwater and not subject to the permitting authority of the State Water Board. By letter dated May 4, 1998, Division Chief Edward C. Anton notified NGWC that the Division disagreed with Luhdorff and Scalmanini's findings.
- i) Division staff conducted a field investigation on October 7, 1998 to gather information necessary to resolve the protests to NGWC's change petition. Staff concluded that the petition should be approved and that additional conditions be added to the permit. On August 27, 1999, the Division Chief signed State Water Board Order WR 99-09-DWR, which included the following amendments to P14853:
 - 1. Delete the original point of diversion and add Wells 4 and 5 as points of diversion, and
 - 2. Replace Term 10 with terms requiring NGWC to measure the flow of the North Fork Gualala River per a schedule provided for in the order and a method to be approved by the Division Chief.
- j) NGWC did not challenge Order WR 99-09-DWR, but two other parties filed petitions for reconsideration by the State Water Board. In response to these petitions, the State Water Board adopted State Water Board Order WR 99-011, which dismissed the petitions for reconsiderations and added a requirement for a water supply contingency plan to address how NGCW will meet municipal water demands when the flows in the North Fork Gualala River fall below the minimum bypass requirements of Term 9.
- k) NGWC submitted to the Division Chief a Surface Flow Measurement Plan (Measurement Plan) on October 26, 1999, and a Water Supply Contingency Plan (Contingency Plan) on May 18, 2000. The Division Chief found both plans to be inadequate. Several attempts were made by both parties to reach an agreement on the plans. Finally, by letter dated April 2, 2001, the Division Chief advised NGWC that it could file a petition for reconsideration with the State Water Board if it disagreed with the Division's action disapproving the plans. NGWC filed a petition on May 1, 2001, requesting the State Water Board to hold a hearing not only on the adequacy of the plans, but also on the legal classification of the water pumped by Wells 4 and 5 and the correct interpretation of Term 9 (whether bypass flows must be met so long as operation of the wells do not affect surface flow). The State Water Board held a hearing on the petition, and on June 21, 2001 adopted State Water Board Order WR 2001-14 denying reconsideration, affirming the decision of the Division, and amending the requirements of the Contingency Plan including authorization for the Division Chief to approve a variance in the bypass flow requirements for the purpose of studying the effects of pumping from Wells 4 and 5 on surface flows.
- l) On July 19, 2001, NGWC filed a lawsuit against the State Water Board in the Mendocino County Superior Court to seek a judicial determination on the legal classification of the groundwater pumped by Wells 4 and 5. In consultation with the presiding judge, NGWC and the State Water Board agreed that if NGWC made a proper request for hearing on the issue the State Water Board would follow through and issue a decision or order by the end of 2002. On January 11, 2002, NGWC made such a request of the Board. The State Water Board held a hearing on the request, and on February 19, 2003 adopted State Water Board Order WR 2003-0004, which states that the groundwater pumped by NGWC's Wells 4 and 5 (along with the proposed Wells 6 and 7) is extracted from a subterranean stream and is therefore

under the permitting authority of the State Water Board. NGWC's petition for reconsideration of the order was denied by the State Water Board on May 6, 2003.

- m) NGWC pursued its lawsuit against the State Water Board. In 2004, the Mendocino County Superior Court upheld the State Water Board's determination, ruling that NGWC's wells fell under the permitting authority of the State Water Board. NGWC appealed the case, and in 2006 the Appellate Court upheld the ruling of the Superior Court. In August 2006, the California Supreme Court denied review of the litigation.
- n) As of this date, NGWC does not have an approved Contingency Plan or Measurement Plan. In a December 14, 2006 letter to Division staff, NGWC stated that they have received an estimate from an engineering firm of \$700,000 to prepare a report that will contain all the information required by Orders WR 99-011 and WR 2001-14. Because NGWC did not have the funds to cover this expense, it sought authorization with the California Public Utilities Commission (PUC) for a rate increase to cover the costs of the report. On March 13, 2008, the PUC approved Resolution W-4678, giving NGWC the authority to borrow \$100,000 from the Departments of Public Health (DPH) and Water Resources (DWR) for the purpose of financing a planning study on NGWC's water system. This loan amount appears inadequate to fund the cost of the report so additional loans from DPH, DWR, or other sources will be necessary.

The Department of Public Health issued Compliance Order No. 02-03-08CO-002 on September 9, 2008. This order contains a finding that NGWC does not have sufficient water rights to provide a reliable and adequate supply of pure, wholesome, healthful and potable water in accordance with California Health and Safety Code section 116555, subdivision (a) (3), and cannot provide source capacity to meet maximum daily demand requirements in accordance with California Code of Regulations, title 22, section 64554. This order is based on the following:

- The maximum daily demand in 2003 and 2004 was 299 gallons per minute (gpm) and the maximum daily demand with the current 1,033 service connections is 313 gpm.
- The maximum available supply from all surface sources is 100 gpm.
- The maximum reliable supply from Wells 4 and 5 is zero (0) gpm as diversions from these wells must be terminated when the bypass flows cannot be met.

The order further requires NGWC to submit a Source Capacity Planning Study by October 1, 2009 that includes information concerning NGWC's ability to reliably and adequately serve the existing service connections in compliance with all applicable laws and regulations and a discussion of NGWC's water rights. The order also requires NGWC to submit a plan of action by March 1, 2010, to address or resolve source capacity deficiencies including, but not limited to, increased water conservation, acquisition of additional source capacity and water rights, and/or restrictions on new service connections.

- o) Regardless of whether NGWC is in compliance with the term requiring approved Contingency and Measurement Plans, P14853 is explicit in its requirement to cease diversion when minimum bypass flows are not available. To ensure that adequate flows are available, P14853 requires NGWC to take flow measurements of the North Fork Gualala River by a prescribed schedule and to report the measured results to the Division. Between June 1 and December 15, the schedule requires a minimum of weekly measurements, and daily measurements if the flow falls below the bypass minimum.

- p) Based on reports of measurements taken from 2004 through 2007, there were at least 11 days in which the flows measured by NGWC were below the required minimum bypass flows. In addition, there was one day in which Division staff measured a flow that was below the required minimum bypass. NGWC has admitted that diversions from Wells 4 or 5 have continued daily throughout the years 2004 through 2007.
- q) Based on rainfall data recorded at the nearby Yorkville station, Division staff determined that an additional 46 days of diversion almost certainly occurred during 2004 through 2007 when, flows in the North Fork Gualala River were less than the required minimum³.

PROPOSED CIVIL LIABILITY

- 5. The basis of this complaint is NGWC's unauthorized diversions of water from North Fork Gualala River between the years 2004 and 2007, because diversions occurred during times when the flows in the river were less than the minimum bypass flows required under P14853. These unauthorized diversions of water constitute a trespass within the meaning of Water Code section 1052, subdivision (a).
- 6. The maximum civil liability that can be imposed by the State Water Board in this matter is \$500 for each day in which the trespass occurred. Between 2004 and 2007, NGWC made unauthorized diversions on at least 58 days, therefore, a maximum civil liability of \$ 29,000 could be considered (\$500 per day x 58 days) for the trespass.
- 7. In determining the amount of civil liability, Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator. In this case, NGWC, over a period of four years, continued to knowingly divert water from the North Fork Gualala River on days when its stream flow did not meet the minimum bypass requirement for diversion even though the terms and conditions of the permit prohibited such diversions.
- 8. The North Fork Gualala River has been designated by the National Marine Fisheries Service as critical habitat for two species listed as threatened under the federal Endangered Species Act: Central California Coast coho salmon (61 Fed.Reg 56138 (Oct. 31, 1996).) and Northern California steelhead (65 Fed.Reg 36074 (June 7, 2000).). NGWC's unauthorized diversions may have reduced the amount of flow in the surface portion of the North Fork Gualala River and may also have reduced the available habitat for the listed species. Absent an analysis demonstrating that the potential reduction in flow and habitat does not adversely impact these species, the potential for adverse impacts to listed species exists.
- 9. An economic advantage was obtained from the unauthorized diversions of water because customers were charged for water that the NGWC should have left in the stream system in order to comply with the fishery flow bypass requirement. The Division estimates the revenue generated to be approximately \$34,240 for the 58 days of unauthorized diversions. This amount is based on a rate of \$3.13 per 100 cubic-feet of water charged to municipal customers and average diversions of 13.3 acre-feet and 12.8 acre-feet for the months of November and December, respectively, as reported by the NGWC. Additionally, the Division estimates that its staff cost to review the existing project and develop the enforcement documents to be \$7,252. However, Water Code section 1052, subdivision (b) limits the amount of liability to a maximum of \$500 per day. For 58 days of unauthorized diversions, this limitation would be \$29,000.

³ NGWC did not comply with the requirement to measure instream flows on a daily basis if the flow dropped below the minimum required. This constitutes a violation of the terms and conditions of the NGWC's water right permit, but not necessarily an unauthorized diversion.

10. Having taken into consideration the factors described above, including NGWC's ability to pay, the Assistant Deputy Director for Water Rights recommends an ACL in the amount of **\$11,600**. This liability amount is the minimum liability recommended by the Division; although the State Water Board may consider a different liability, if this matter goes to hearing.

RIGHT TO HEARING

11. NGWC may request a hearing on this matter before the State Water Board. Any such request for hearing must be received or postmarked within 20 days of the date this notice is received. (Wat. Code, § 1055, subd. (b).)
12. If NGWC requests a hearing, it will have an opportunity to be heard and to contest the allegations in this Complaint and the imposition of an ACL by the State Water Board. If a hearing is requested, separate notice setting the time and place for the hearing will be mailed not less than 10 days before the hearing date.
13. If NGWC requests a hearing, the State Water Board will consider at the hearing whether to impose the civil liability, and if so, whether to adjust the proposed liability within the amount authorized by statute. Based on the evidence received at the hearing, the State Water Board may take any appropriate action in accordance with sections 100, 275, and 1050 et seq. of the Water Code and its responsibilities under the public trust doctrine. Any State Water Board order imposing an ACL shall become final and effective upon issuance.
14. If NGWC does not wish to request a hearing, a cashier's check or money order should be remitted within 20 days of the date of this Complaint for the amount of the ACL set forth in paragraph 10 above, to:

State Water Resources Control Board
Division of Water Rights
Enforcement Section
P.O. Box 2000
Sacramento, CA 95812-2000

15. If NGWC does not request a hearing and does not remit the ACL, the State Water Board may seek recovery of the ACL as authorized by Water Code section 1055.4.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY:

James W. Kassel
Assistant Deputy Director for Water Rights

Dated: OCT 24 2008